

BELLSOUTH

ORIGINAL

BellSouth Corporation
Suite 900
1133 21st Street NW
Washington, DC 20036-3351

glenn.reynolds@bellsouth.com

Glenn T. Reynolds
Vice President -
Federal Regulatory

202 463 4112
Fax 202 463 4142

RECEIVED

NOV - 7 2003

November 6, 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 01-17

Dear Ms. Dortch:

On November 5, 2003, Mike Harper, Don Barbour and the undersigned, representing BellSouth, met with Commission staff to discuss Thrifty-Call's Petition for Declaratory Ruling. Representing the Commission at this meeting were William Maher, Jeffrey Carlisle, Tamara Preiss, Josh Swift and Joi Nolen. The attached presentation was handed out and formed the basis of this meeting. Additionally, I am attaching orders of the North Carolina Public Service Commission related to this matter that were requested by the staff.

Pursuant to Commission rules, please include this notice and attachments in the record of the proceeding identified above.

Sincerely,

Attachments

cc William Maher
Jeffrey Carlisle
Tamara Preiss
Josh Swift
Joi Nolen

0+1

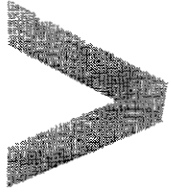
BellSouth's Updated Response to Thrifty Call Petition for Declaratory Ruling CCB-CPD File No. 01-17

Mike Harper

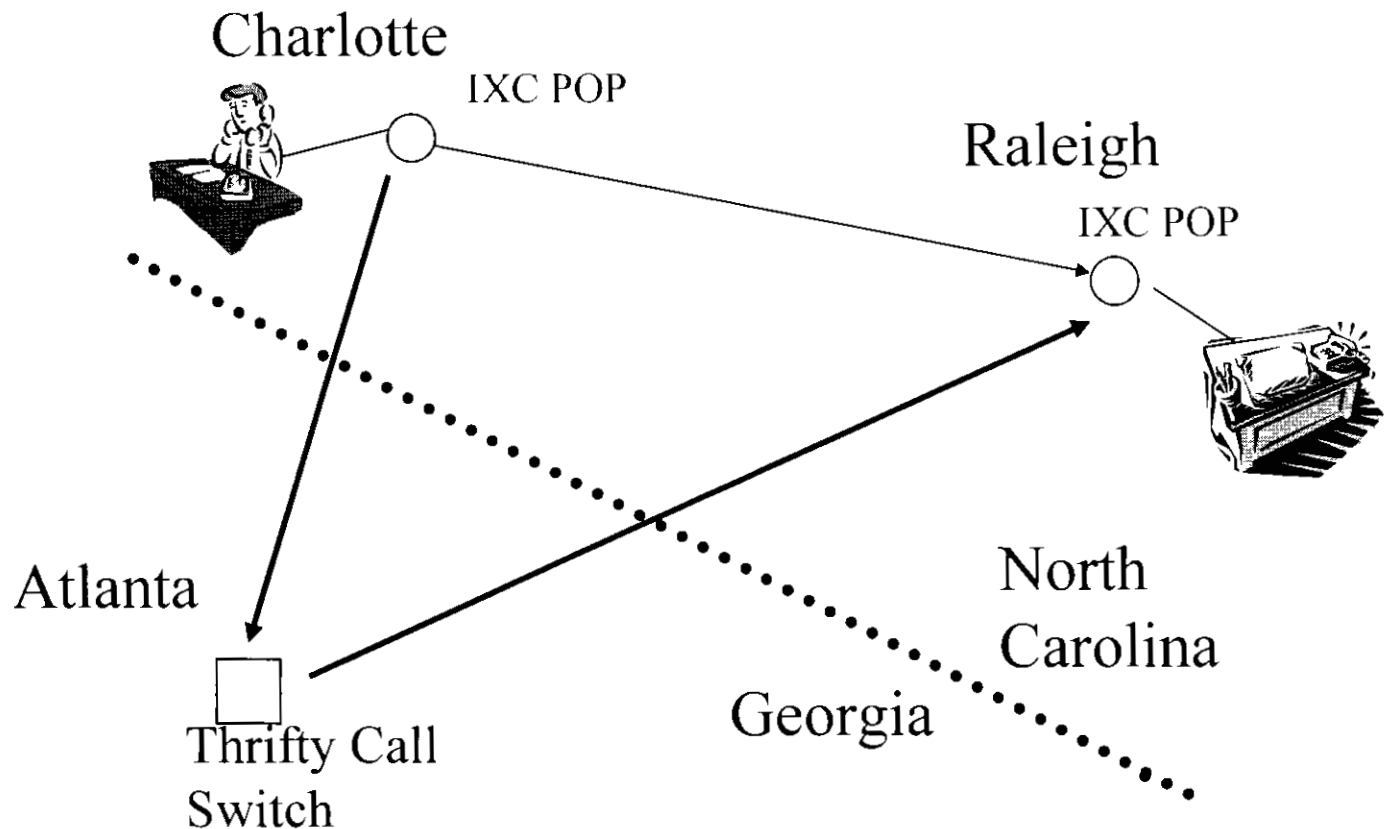
November 5, 2003

>>> connect >> and create somethingSM

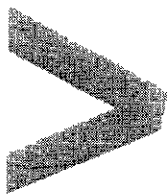
© BELLSOUTH'



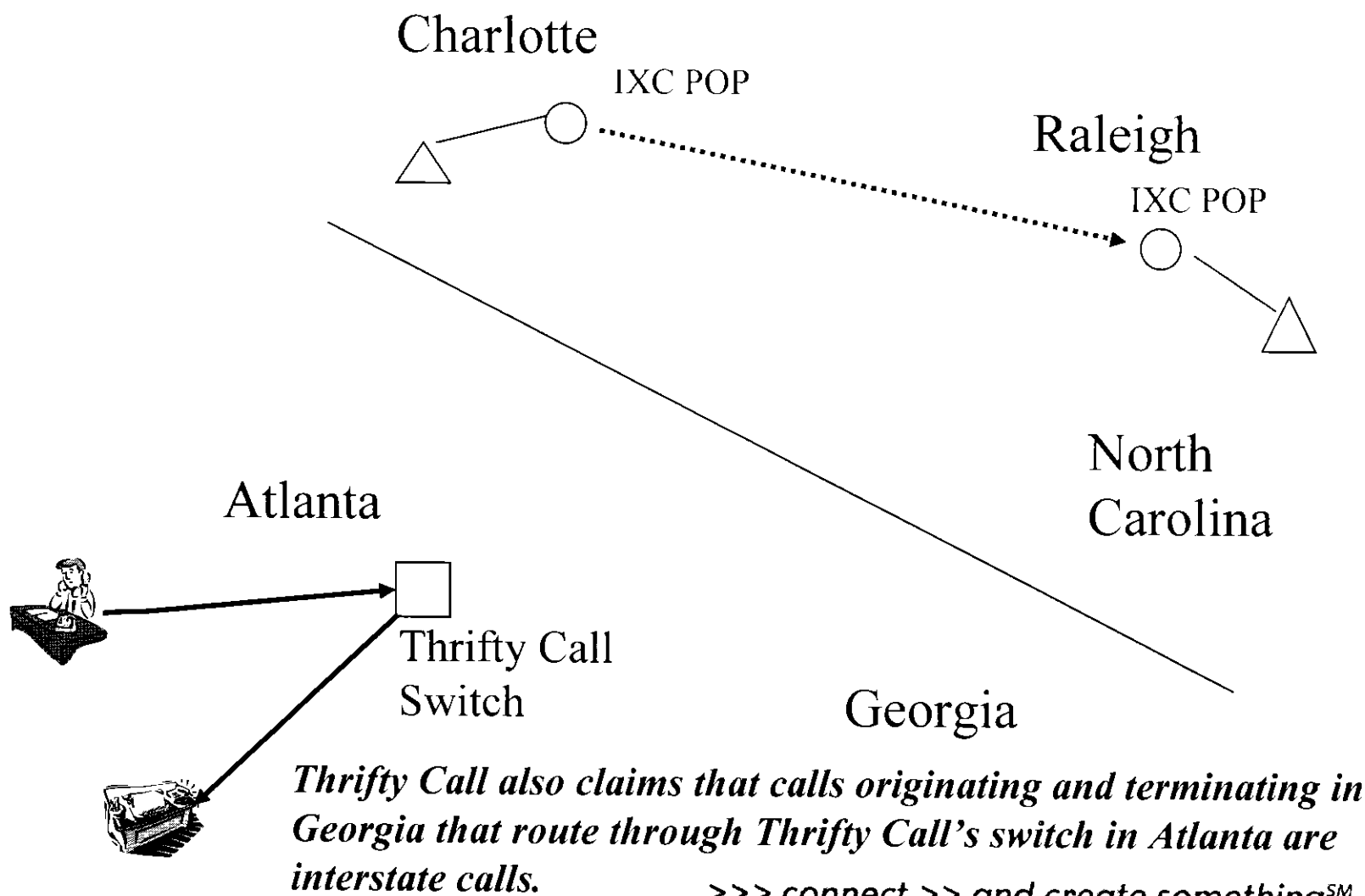
Thrifty Call Switch Arrangement

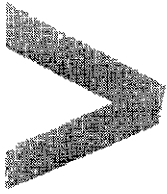


Thrifty Call claims that calls between Charlotte and Raleigh are interstate because the calls are routed through Thrifty Call's switch in Atlanta



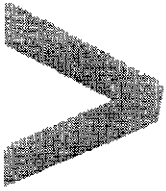
Thrifty Call Switch Arrangement





BellSouth's Tariffs

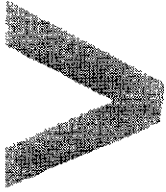
- Thrifty Call claims that BellSouth's access tariffs support its assignment of jurisdiction.
- BellSouth's access tariffs do not support Thrifty Call's jurisdictional assignments because:
 - The provisions of BellSouth's access tariffs apply to a single IXC in the routing of a call. The tariff does not address the case where a carrier hands off the traffic to other carriers, because the jurisdiction of traffic should not be affected, or changed, regardless of the number of carriers involved. Under Thrifty Call's interpretation, jurisdiction is subject to change each time the call is passed to another carrier.
 - While Thrifty Call relies on its interpretation of BellSouth tariffs to justify its jurisdictional assignment of North Carolina traffic, it uses a totally different method for Georgia traffic--one that financially benefits Thrifty Call.
 - Thrifty Call attempted to hide its selective application of jurisdiction by deleting the originating, or Calling Party Number, information.
 - BellSouth is unaware of any financial advantage for a carrier to hand off traffic to another carrier for termination unless there is knowledge that the jurisdiction will be altered and that a lower than appropriate terminating rate will apply.



Basis of BellSouth's Action Against Thrifty Call

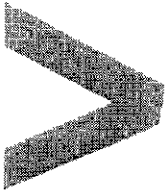
- BellSouth noticed that Thrifty Call reported 100% PIU.
- BellSouth performed test calls using its Mechanized Analysis and Test Validation system (MATV). Test calls indicated that usage was intrastate, but was reported as interstate.
- BellSouth filed complaints against Thrifty Call in North Carolina (Commission ruling issued in May 2001) and in Florida (case is pending but has not been heard).
- Under a motion to compel in North Carolina, Thrifty Call produced its switch records that confirmed that essentially 100% of the calls it processed for North Carolina were intrastate calls, not interstate calls as Thrifty Call claimed.
- In testimony in North Carolina, Thrifty Call stated it relied on the FCC's "Entry-Exit" Order 85-145, released April 16, 1985, as the basis to assign the North Carolina traffic to interstate.
- North Carolina PSC found in favor of BellSouth on all of the issues raised in this proceeding.

>>> connect >> and create somethingSM



Why the “Entry-Exit” Rule is not applicable to Feature Group D Carriers

- The FCC Order establishing the “Entry-Exit” method clearly states that the “Entry-Exit” rule applies only to Feature Groups A and B. Since FGA and FGB carry no originating call information, the order provided FGA and FGB carriers with a surrogate method to determine jurisdiction at a time when the majority of IXCs were required to use FGA/FGB.
- With the implementation of equal access, however, Feature Group D is the primary access service for most carriers, including Thrifty Call. Indeed, at all times relevant to BellSouth’s complaint, Thrifty Call was purchasing FGD switched access from BellSouth.
- Since FGD access service transmits originating call information, such as ANI and calling party number (CPN), there is no longer a need for FGD carriers to rely on the “Entry-Exit” rule.



Recommendation Regarding the “Entry-Exit” Rule

- BellSouth requests that the FCC confirm that the “Entry-Exit” jurisdictional method is not applicable to FGD carriers such as Thrifty Call, because:
 - The long-standing criteria for the assignment of the jurisdiction of a call is the identification of the two end points, e.g., the originating and terminating locations, and is not affected by the manner in which a call is routed. Both the courts and the FCC have used an “end-to-end” analysis to determine the jurisdiction of a call. Moreover, states have relied on this precedent to conclude that when a call originates and terminates in the same state, it is an intrastate call. The intermediate transport or switching does not alter the jurisdictional nature of the call even if it occurs outside the states’ boundaries. See *BellSouth Telecommunications, Inc. v. Thrifty Call, Inc.*, Docket No. P-447, Sub 5, (North Carolina Utilities Commission 2001) and *Northwest Telco, Inc. v. Mountain States Telephone and Telegraph Co.*, 88 Pub. Util. Rep. (PUR) 4th 462 (Idaho Pub. Util. Commission 1987).



APPENDIX



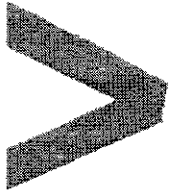
Effects of Misrepresented Traffic from Carriers Other than Thrifty Call

- BellSouth has identified numerous carriers, including Thrifty Call, that misrepresent the jurisdiction of calls in order to pay a lower than appropriate access rate.
 - Of the approximate three hundred IXCs and CLECs terminating traffic to BellSouth, at least 30 percent report terminating PIU factors that differ significantly from information available to BellSouth.
 - Of those carriers, BellSouth has filed retroactive claims with approximately 15 carriers, first directly with the carrier, then with state commissions if no resolution is reached.
 - As a result of carrier misreporting of usage factors, BellSouth has underbilled carriers in excess of \$100M in intrastate terminating switched access revenue since 2000.
- Many of those carriers, including Thrifty Call, delete originating call detail from the call record in an attempt to disguise the misclassification of traffic sent to BellSouth.
- A number of those carriers, again including Thrifty Call, cite the “Entry-Exit” Order as the rationale to assign the originating location of the call as where it enters the carrier’s network, disregarding the originating caller’s location.



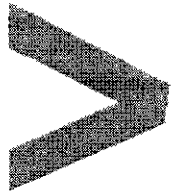
Recent Carrier Activity

- Extensive analysis of carrier call data demonstrates that, rather than seeing a reduction of misreporting activity as a result of BellSouth's carrier traffic examinations, BellSouth notes increasing occurrences of systematic methods to disguise the jurisdiction of long distance, or access, traffic.
- While prior methods generally misrepresented intrastate access traffic as interstate access, there are more widespread attempts to portray access traffic as local.
- Carriers engaging in misreporting of traffic most often cite the inability to forward Calling Party Number (CPN) or other originating information. Many of those carriers cite the FCC's 1985 "Entry-Exit" order as support for setting the origination of the call at the point where the call enters its network, rather than identifying the actual originating location of the calls.



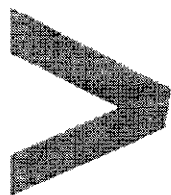
Specific “Arbitrage” Examples

- CLECs propose alternative routing schemes to IXCs where originating IXC access traffic is diverted to a “VoIP” soft switch. The traffic is then routed to the CLEC for terminating to other ILECs, such as BellSouth, as local traffic. As part of this method, CPN is lost, or removed, and a common billing telephone number is used. (See drawing on page 15)
- Certain IXCs claim an exemption from switched access charges under the FCC’s enhanced services rules for phone-to-phone traffic that the IXCs supposedly route via a “VoIP” facility. BellSouth believes that phone-to-phone traffic is subject to access charges, regardless of whether or not any IP facilities are actually used in the routing of the calls.
- IXCs and certain “business customers” route access traffic over ISDN PRI facilities generating loss of CPN and causing the terminating traffic to appear to be local.
- Providers of flat-rate calling cards order local 800 service from CLECs. Once the calls are translated to a local number and arrive at the CLEC facilities, the card purchaser enters a PIN and destination telephone number and the call is re-originated to distant points, including international calls.



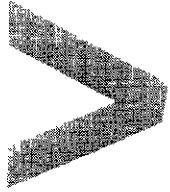
BellSouth Traffic Monitoring

- BellSouth previously did not have call detail for traffic terminating to BellSouth from other carriers in order to validate jurisdiction reported by the carriers.
- Beginning in early 2000, BellSouth installed the Agilent Business Intelligence system. This system collects call detail for essentially all calls across BellSouth's network and stores the call detail in a centralized data site.
- From the stored data, BellSouth can now ascertain the jurisdiction of traffic from specific carriers by trunk group and state. The data is available daily.
- BellSouth has used this system since mid-2000 to identify and attempt to recover underbilled access revenue caused by misreported PIU factors that were previously self-reported by carriers.



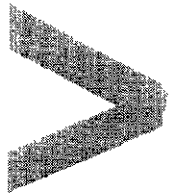
Importance of Calling Party Number (CPN) Data Field

- CPN is part of SS7 Message Detail unless actively deleted or altered.
- FCC Rules currently require delivery of CPN.
- High percentage of calls without CPN is an indicator of possible misclassification of calls.
- Lack of CPN devalues Caller ID-like Services.
- Other indicators of the originating point of calls, such as Automatic Number Identification (ANI) are sometimes available, but CPN is the desired source due to its universal acceptance in the industry as the preferred identification of the originating location of calls.

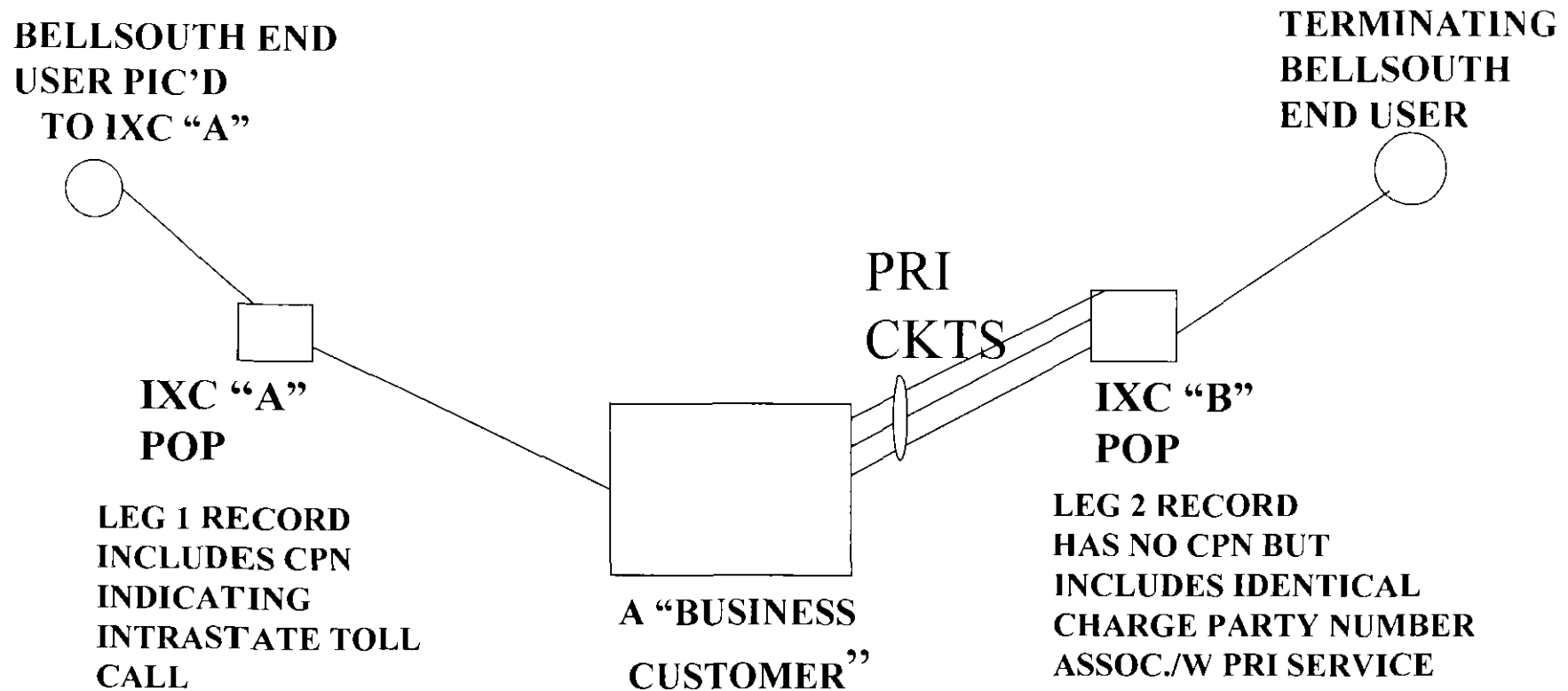


BellSouth Attempts to Ensure That Carriers Forward Originating Call Detail

- Part 64 of FCC rules require carriers to forward CPN whenever possible.
- Many carriers disregard this rule and do not forward any originating call information.
- Many times the elimination of originating call information is an attempt to disguise misreporting of traffic jurisdiction.
- BellSouth currently has an issue at the Ordering and Billing Forum (OBF) to require carriers to use the Jurisdictional Information Parameter (JIP) field on the SS7 record. This field would indicate the originating location of the call.



Carrier using VoIP Switch to Terminate Traffic via PRI Facilities



END RESULT IS THAT TOLL CALLS APPEAR AS LOCAL CALLS

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-447, SUB 5

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
BellSouth Telecommunications, Inc.,)	
)	
Complainant,)	
)	RECOMMENDED ORDER
v)	RULING ON COMPLAINT
)	
Thrifty Call, Inc.,)	
)	
Respondent.)	

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on December 5, 2000, at 9:00 a.m.

BEFORE. Commissioner Sam J. Ervin, IV
Commissioner William R. Pittman
Commissioner J. Richard Conder

APPEARANCES:

FOR BELLSOUTH TELECOMMUNICATIONS, INC

Andrew D. Shore, BellSouth Telecommunications, Inc., 1521 BellSouth Plaza, Post Office Box 30188, Charlotte, North Carolina 28230

Michael Twomey, BellSouth Telecommunications, Inc., Legal Department, Suite 1870, 365 Canal Street, New Orleans, Louisiana 70130-1102

FOR THRIFTY CALL, INC.

Marcus W. Trathen, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., Post Office Box 1800, Raleigh, North Carolina 27602

Danny E. Adams, Kelley Drye and Warren, L.L.P., 1200 19th Street, N.W., Suite 500, Washington, D.C. 20036

BY THE COMMISSION: BellSouth Telecommunications, Inc., (BellSouth) initiated this proceeding on May 11, 2000, by filing a Complaint against Thrifty Call, Inc., (Thrifty Call). BellSouth alleged that Thrifty Call had misreported PIU factors to BellSouth under its tariffs, by intentionally overstating its percent interstate usage. On May 15, the Commission ordered that BellSouth's Complaint be served upon Thrifty Call.

On June 5, 2000, Thrifty Call responded to BellSouth's Complaint by filing a Motion to Dismiss or, in the Alternative, to Stay. Based on the language of BellSouth's own tariff, Thrifty Call argued that the Commission should dismiss or at least stay BellSouth's Complaint, given that BellSouth had requested relief that it was beyond the powers of the Commission to grant. On June 7, 2000, the Commission ordered that Thrifty Call's response be served upon BellSouth.

On June 21, 2000, BellSouth filed a reply in opposition to Thrifty Call's Motion to Dismiss or Stay.

On June 23, 2000, the Commission issued an Order Denying Motion and Setting Hearing, which denied Thrifty Call's request for dismissal or a stay, set this matter for hearing at 9:30 a.m. September 19, 2000, and established a schedule for the submission of prefiled testimony.

On July 12, 2000, BellSouth served its first set of data requests upon Thrifty Call, consisting of both interrogatories and requests for production of documents.

On August 1, 2000, Thrifty Call filed a Motion for Reconsideration of the Commission's Order Denying Motion and Setting Hearing, reiterating its arguments that the language of the tariff in question compelled the conclusion that the Complaint should be dismissed and further pointing out that the relief requested by BellSouth was either moot or beyond the Commission's jurisdiction to grant.

On the same date, BellSouth filed a Motion for Entry of Procedural Order, in which BellSouth requested that the Commission establish a discovery schedule and postpone the hearing in order to provide adequate time for the completion of discovery.

On August 8, 2000, BellSouth filed a Response to Motion for Reconsideration and Request for Stay of Discovery and asked that the Commission deny Thrifty Call's Motion.

On August 11, 2000, the Commission issued an Order Denying Motion for Reconsideration and Granting Motion for Procedural Order that denied Thrifty Call's Motion for Reconsideration. The Order also established procedures for the conduct of discovery, rescheduled the hearing in this matter for 1:30 p.m. on December 4, 2000, and established a new schedule for the submission of prefiled testimony.

On August 18, 2000, Thrifty Call filed objections to BellSouth's data requests. On September 6, 2000, the Commission issued an order overruling all objections, save for one.

On September 13, 2000, Thrifty Call filed a Motion for Temporary Stay with the Commission seeking an order temporarily staying Thrifty Call's obligation to respond to BellSouth's data requests pending application for Writ of Certiorari to the North Carolina Court of Appeals.

On September 14, 2000, Thrifty Call filed a Petition for Writ of Certiorari and Petition for Writ of Supersedeas with the Court of Appeals, seeking interlocutory review of the Commission's failure to dismiss BellSouth's Complaint. On September 14, the Court of Appeals issued an order temporarily staying the proceedings before the Commission. On September 29, 2000, BellSouth filed a Response in Opposition to Thrifty Call's Petition for Writ of Certiorari and Petition for Writ of Supersedeas. On October 4, 2000, the Court of Appeals issued an order denying Thrifty Call's Petition for Writ of Certiorari and Petition for Writ of Supersedeas.

After the exchange of discovery, on October 20, 2000, BellSouth filed the testimony and exhibits of Mike Harper, and the testimony of Jerry Hendrix.

On November 3, 2000, Thrifty Call filed the testimony and exhibits of Harold Lovelady.

On November 8, 2000, BellSouth requested that the Commission reschedule the hearing in this matter for 9:00 a.m. on December 5, 2000.

On November 13, 2000, BellSouth filed the rebuttal testimony of Mike Harper.

On that same date, the Commission issued an Order rescheduling the hearing in this matter for 9:00 a.m. on December 5, 2000.

At the evidentiary hearing, which began as scheduled on December 5, 2000, BellSouth offered the testimony of Mike Harper and Jerry Hendrix. Thrifty Call offered the testimony of Harold Lovelady.

FINDING OF FACT

1. Thrifty Call misreported Terminating Percent Interstate Usage to BellSouth in the period from 1996 to 2000 and should pay BellSouth \$1,898,685.00 representing the amount in intrastate switched access charges Thrifty Call should have paid for that period.

2. BellSouth was not required to conduct an audit of Thrifty Call prior to filing a complaint for relief.
3. Additional arguments raised by Thrifty Call are without merit.

**EVIDENCE AND CONCLUSIONS FOR
FINDING OF FACT NO. 1**

This case involves the calculation and reporting of Terminating Percent Interstate Usage (TPIU) factors with respect to certain Feature Group D (FGD) traffic. BellSouth contends that Thrifty Call has misreported 98% of its terminating traffic as interstate when in fact 90% was intrastate. The practical importance of this relates to the payment of access charges. Since access charges for interstate traffic tend to be lower than those for intrastate traffic, a higher TPIU means the payment of less access charges. BellSouth seeks payment from Thrifty Call in the amount of \$1,898,685, representing the amount of intrastate switched access charges it maintains that Thrifty Call should have paid in the period 1996 to 2000.

Thrifty Call is an interexchange carrier (IXC) whose network operated in relevant part as follows: Thrifty Call would receive traffic originating in North Carolina from another IXC, usually MCI WorldCom. That traffic would be to Thrifty Call's switch in Atlanta, Georgia. Thrifty Call would route the traffic over its own network back to North Carolina for delivery to BellSouth and, ultimately, to end-users. Thus, it is apparent and, indeed, uncontested that the traffic both originated and terminated in North Carolina. Thrifty Call witness Lovelady admitted that at least 90 % of the calls originated and terminated in North Carolina. The call detail records reluctantly provided by Thrifty Call confirm this. How, then, could such traffic be converted from intrastate to interstate traffic?

The answer that Thrifty Call returns is that it was appropriately relying on the FCC's entry-exit surrogate (EES) methodology. BellSouth replies that this methodology was not meant to apply to FGD traffic. Rather, the appropriate standard is to be found in BellSouth's intrastate tariff, which clearly supports BellSouth's view.

The two tariffs are in pertinent part set out as follows:

1 BellSouth Telecommunications, Inc. Tariff FCC No. 1 (FCC Tariff) ¶
2.3.10(A)(1)(a)

Pursuant to Federal Communications Commission Order FCC 85-145 adopted April 16, 1985, interstate usage is to be developed as though every call that enters a customer network at a point within the same state as that in which the called station (as designated by the called

station number) is situated is an intrastate communication and every call for which the point of entry is in a state other than that where the called station (as designated by the called number) is situated is an interstate communication (emphasis added)¹

2 BellSouth Telecommunications, Inc. Access Services Tariff (Intrastate Tariff)
§E.2.3.14 (A)(2)(a)

The intrastate usage is to be developed as though every call that originates within the same state as that in which the called station (as designated by the called station number) is situated is an intrastate communication and every call for which the point of origination is in a state other than that where the called station (as designated by the called station) is situated is an interstate communication.

A comparison of the language of the two tariffs yields substantial similarities and a few differences. Both indicate that if the two relevant points are within the state, then the call is intrastate. If the relevant points are in different states, the call is interstate. The principal difference is that the FCC tariff uses the phrase "enters a customer's network" while the intrastate tariff uses the word "originates."

This is the nub of Thrifty Call's argument. Thrifty Call argues that the calls enter its network in Atlanta and go to North Carolina. They are, therefore, ipso facto interstate calls, regardless of where they originate or terminate.

This argument, though ingenious, is also specious. The FCC Tariff language states "enters a customer network" (emphasis added), not necessarily Thrifty Call's network. The call that Thrifty Call is carrying in fact originates and terminates in North Carolina. The record is uncontroverted that, with respect to the minutes of use at issue, Thrifty Call is acting as a subcontractor for another IXC. For the purposes of properly construing this language, "enters a customer network" refers to the IXC whose customer originates the call.² There is one call, not two.

¹According to Thrifty Call, this tariff applies to FGD traffic as well as to Feature Group A (FGA) and Feature Group B (FGB) traffic. (See, FCC Tariff ¶ 2.3.10(A)(1)(b)); however, the original FCC Order 85-145 addressed FGA and FGB only)

²It should be recalled that the language ultimately derived from an FCC Order issued in 1985-- close to telecommunications prehistory from our present perspective. The somewhat odd and "antique" use of the phrase derives from the fact that the originating IXC is a "customer" to the LEC's access services. The preferred modern usage is "originating."

This conclusion is buttressed by further considerations. First, if Thrifty Call's interpretation were correct, it would mean open season for the "laundering" of minutes of use. An originating carrier with large amounts of intrastate traffic might be irresistibly tempted to convert such intrastate traffic into interstate traffic through the simple expedient of handing off such traffic to another IXC with a switch in a different state. Such IXCs might be irresistibly tempted to enter into financial arrangements based on the avoidance of the payment of intrastate access charges otherwise due. It is undoubtedly better to remove this temptation than to abet it.

Second, if Thrifty Call were correct, then it should have applied the same methodology in Georgia. Logically, most Georgia calls should have been intrastate. At hearing, however, Thrifty Call admitted in Georgia that it used the originating and terminating points of the calls to determine whether the call was intrastate or interstate. Thrifty Call was apparently selective in its adherence to the EES methodology.

In summary, it does not matter which tariff is used to arrive at the TPIU. The conclusion is the same. The traffic at issue is intrastate if it originates and terminates in North Carolina or if it "enters a customer network" in North Carolina and terminates in North Carolina. It does not matter whether more than one IXC is involved or where in the country the call is switched between the beginning point and the end point. It is not necessary to establish that Thrifty Call has evil intent or that it "intentionally" misreported the minutes of use to require that Thrifty Call pay what it ought to have paid to begin with. It is sufficient that the minutes of use were misreported.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

One of the long-running sub-themes of this proceeding is Thrifty Call's insistence that BellSouth was obliged by Tariff Section E2 3.14 (B)(1) to perform an audit of Thrifty Call prior to filing a complaint. Thrifty Call also wanted to limit the audit to adjusting the PIU on a going-forward basis. Thrifty Call has continued in its past-hearing filings to argue this issue.

The Commission has twice ruled against Thrifty Call on this issue--first, in its June 23, 2000, Order Serving Motion and Setting Hearing and, second, in its August 11, 2000, Order Denying Motion for Reconsideration and Granting Motion for Procedural Order--noting that the tariff provision was permissive, not mandatory. The Commission sees no reason to change its view on the matter now and reaffirms it based on the reasoning set out previously.

EVIDENCE AND CONCLUSIONS FOR
FINDING OF FACT NO. 3

Additional arguments raised by Thrifty Call are also without merit

Thrifty Call has questioned the Commission's authority to award backbilling in this proceeding because BellSouth has allegedly not supported its calculation of the \$1,898,685 in "unbilled access charges" and is in any case limited by its tariffs, any deviation from which would constitute an award of damages

On the contrary, the Commission believes that the \$1,898,685 is well supported. See, e.g., Harper Direct, Tr. at 20-21. The Commission's authority to require the payment of sums that should have been paid but were not because of inappropriate classification is well-established and does not constitute an award of damages. Thrifty Call's argument that BellSouth's recovery is limited by its tariff is simply a variation of its argument rejected in Finding of Fact No. 2.

Thrifty Call has also suggested that BellSouth is barred by the doctrine of laches from the relief it requests. The Commission does not believe that BellSouth engaged in an unreasonable delay injurious or prejudicial to Thrifty Call in bringing its complaint.

IT IS, THEREFORE, ORDERED that Thrifty Call shall pay BellSouth the amount of \$1,898,685, representing the amount of intrastate access charges Thrifty Call should have paid.

ISSUED BY ORDER OF THE COMMISSION.

This the 11th day of April, 2001.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

pe040401 01

Commissioner William R. Pittman resigned from the Commission on January 24, 2001, and did not participate in this decision.

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. P-447, SUB 5

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	
BellSouth Telecommunications, Inc.,)	
Complainant)	
)	ORDER DENYING
v.)	MOTION AND
)	SETTING HEARING
Thrifty Call, Inc.,)	
Respondent)	

BY THE CHAIR. On May 11, 2000, BellSouth Telecommunications, Inc. (BellSouth) filed a Complaint against Thrifty Call, Inc. (TCI) alleging that TCI had "intentionally and unlawfully" reported erroneous Percent Interstate Usage (PIU) factors to BellSouth in violation of BellSouth's Intrastate Access Tariff (See Section E2.2 14, Jurisdictional Report Requirements) and Commission rules. The PIUs provided by TCI result in an under-reporting of intrastate terminating access minutes terminated to BellSouth, resulting in the loss of approximately \$2 million through the loss of intrastate access revenues.

BellSouth explained that BellSouth and TCI use the PIU reporting method to determine the jurisdictional nature of the traffic being exchanged by the parties and the resulting appropriate billing rate for such traffic. The PIU factor provided by TCI to BellSouth is 98% interstate. The intrastate access rate is higher than the interstate access rate, meaning that it costs TCI less in switched access charges to report terminating interstate minutes than it does to terminate intrastate minutes.

BellSouth stated that in March 1999, it had noticed an abrupt change in the amount of terminating interstate minutes. These increased to over 4,000,000 minutes per month. This caused BellSouth to initiate an investigation using test calls. Among other things, BellSouth placed 171 intrastate test calls and found that TCI did not deliver the Calling Party Number (CPN) for any of the 171 calls. This is evidence of an effort to disguise the jurisdictional nature of the traffic.

BellSouth further stated that in early 2000, it had requested information from TCI to pursue an on-site audit of TCI to determine the PIU of traffic being terminated to BellSouth. TCI purported to agree to an audit, but insisted on terms that would make verification difficult.

BellSouth requested that TCI be found to have intentionally and unlawfully reported traffic as interstate rather than intrastate and that as a result BellSouth has suffered financial harm, that TCI be required to comply with BellSouth's request for an audit to enable BellSouth to accurately calculate its damages; and that such other relief as is appropriate be granted.

On May 15, 2000, an Order Serving Complaint was issued, directing TCI to reply by June 5, 2000

TCI Response

On June 5, 2000, TCI filed a Motion To Dismiss, Or, In The Alternative, To Stay. TCI maintained that BellSouth's Complaint is improper and premature because BellSouth has failed to comply with its own intrastate access tariff which expressly addresses this situation. Specifically, Section E2.3.14B of that tariff provides for audits to be conducted in disputes such as this and sets out procedures to be followed. TCI has never resisted BellSouth's request for an audit and has even recommended a proposed auditor, but BellSouth has not taken any action in response. Instead, BellSouth had demanded payment from TCI without an audit and outside of the tariff's procedures

TCI also disputed BellSouth's claim to continuing harm. TCI said that it is not currently sending traffic to BellSouth and has not done so since January, even to the extent of disconnecting all of its feature group facilities with BellSouth by April 7, 2000.

Until the tariff procedures are fulfilled, a complaint proceeding is a waste of resources. If it is appropriate not to dismiss the Complaint, TCI alternatively requested that the Complaint be stayed until such time as an audit pursuant to BellSouth's North Carolina Intrastate Tariff has been conducted

BellSouth Reply

On June 21, 2000, BellSouth filed a Reply And Opposition To Thrifty Call's Motion To Dismiss Or Stay. BellSouth identified the crux of TCI's argument as being that BellSouth had failed to comply with its intrastate access tariff by not conducting an audit of TCI's call data. BellSouth stated that the provision referred to was permissive, not mandatory:

When an IC [or End User] provides a projected interstate usage set forth in A preceding, or when a billing dispute arises or a regulatory commission questions the projected interstate percentage for BellSouth SWA, the Company may, by written request, require the IC [or End User] to provide the data the IC [or End User] used to determine the projected interstate percentage. This written request will be considered the initiation of the audit. (Tariff Section E2.3 14B(1)) (Emphasis added).

Besides being permissive, this provision is in no way exclusive of other rights and remedies of BellSouth including Commission action. Moreover, the fact that TCI is now willing to undergo an audit in no way constitutes a waiver of BellSouth's right to pursue its complaint.

Indeed, in the absence of an audit, there is ample evidence for BellSouth to proceed with its complaint on the basis of the test calls it conducted as a means of substantiating its claim prior to filing the complaint. There is in fact no need for an audit at this point, and this is why BellSouth withdrew its audit request on April 7, 2000. TCI, it should be noted, also wants to limit the audit to adjusting the PIU on a going-forward basis, but the greater question is one of past violations. BellSouth is also concerned that, while TCI may not be currently passing traffic, it may do so tomorrow and, therefore, potential harm to BellSouth continues to exist.

WHEREUPON, the Chair reaches the following

CONCLUSIONS

After careful consideration, the Chair concludes that TCI's Motion To Dismiss, Or, In The Alternative, To Stay should be denied for the reasons as generally set out by BellSouth. As BellSouth has pointed out, the audit provision in its tariff is permissive, not mandatory, and is not in derogation of any other rights that BellSouth has. Accordingly, the Chair concludes that a hearing be set in this matter.

IT IS, THEREFORE, ORDERED as follows:

- 1 That TCI's Motion to Dismiss, or, in the Alternative to Stay, be dismissed.
- 2 That a hearing be scheduling on this matter beginning on Tuesday, September 19, 2000, at 9.30 a.m., in Commission Hearing Room 2115, 430 North Salisbury Street, Raleigh, North Carolina.
- 3 That BellSouth profile testimony by no later than August 18, 2000

4 That TCI prefile testimony by no later than September September 1, 2000.

5 That BellSouth prefile rebuttal testimony by no later than September 8, 2000.

ISSUED BY ORDER OF THE CHAIR.

This the 23rd day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION

Cynthia S. Trinks

Cynthia S. Trinks, Deputy Clerk

7/27/2000 CP

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO P-447, SUB 5

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
BellSouth Telecommunications, Inc ,)	
Complainant)	ORDER DENYING MOTION
)	FOR RECONSIDERATION
v.)	AND GRANTING MOTION
)	FOR PROCEDURAL ORDER
Thrifty Call, Inc ,)	
Respondent)	

BY THE PRESIDING COMMISSIONER On June 23, 2000, the Commission issued an Order denying Thrifty Call, Inc's (TCI's) Motion to Dismiss, or, in the Alternative, to Stay BellSouth Telecommunications, Inc. (BellSouth's) Complaint filed May 11, 2000. The Commission also scheduled a hearing on this matter beginning on September 19, 2000, with BellSouth to prefile testimony by August 18, 2000, and TCI to prefile testimony by September 1, 2000. On July 12, 2000, BellSouth filed a First Set of Data Requests with TCI, requesting response by August 11, 2000

TCI Motion for Reconsideration

On August 1, 2000, TCI filed a Motion for Reconsideration and Request for Stay of Discovery. According to TCI the Commission's conclusion that the audit provision was permissive and not mandatory was in error, and the "natural and proper interpretation of the provision at issue permits BellSouth to conduct an audit or not, at its discretion, but it must conduct an audit prior to embroiling the Commission in a dispute between the parties" (Emphasis in original) The tariff describes an audit as the sole method of PIU revision and does not provide for other remedies or procedures. This conclusion is compelled by contract and tariff law principle and is prudent public policy. Even should the Commission conclude that BellSouth is not compelled by the terms of its tariff to conduct an audit, it should nevertheless reconsider its Order and dismiss BellSouth's Complaint because the only relief which BellSouth seeks is either moot or beyond the Commission's jurisdiction. The proper remedy for PIU errors is to revise the PIU prospectively from the date of completion of the audit and backwards one quarter. Such remedy will be pointless because TCI has ceased all operations, sold its assets, and terminated all its BellSouth feature groups. TCI has also moved to cancel its certificate.

The operative provision of BellSouth's access tariff, Section E2.3.14B(1) states that "when a billing dispute arise [BellSouth] may, by written request, require the IC [or End

User] to provide the data the IC used to determine the projected percentage. This written request will be considered the initiation of the audit." (Emphasis added). According to TCI, the use of the word "may" in this section means that BellSouth is not required to seek and audit when it dispute the PIU factor of one of its customer; but this does not empower BellSouth to do anything else it chooses instead of an audit. In the event of a billing dispute, BellSouth reserves the right to take steps as serious as ordering an independent audit but will more typically resort to less severe actions, such as negotiation. Any other interpretation makes the tariff binding on customers, but not on BellSouth. This is contrary to the "filed tariff" doctrine requiring common carriers to adhere to their own tariffs.

The above quoted section must also be read in pari materia with other provisions in BellSouth's tariff which make clear that BellSouth's sole, initial remedy is to request an audit. For example, Section E2.3.14(4) provides that "[i]f a billing dispute arise...[BellSouth] will ask the IC [or End User] to provide the data the IC uses to determine the projected interstate percentage. The IC shall supply the data to an independent auditor within thirty days of [BellSouth's] request." TCI's interpretation is consistent with the intent of the audit provisions meant to facilitate cooperative dispute resolution. For example, Section E2.4.1G of the access tariff titled "Payment of Rates, Charges, and Deposits" states: "The Company and the IC shall work cooperatively to resolve the dispute. If additional information of the IC would assist in resolving the dispute, the IC may be requested to provide additional information relevant to the dispute and reasonably available to the customer."

Ironically, BellSouth's own complaint asked the Commission to order TCI immediately to comply with BellSouth's request for an audit of past PIU reporting and minutes of use sufficient to enable BellSouth to calculate its damages.

Lastly, TCI urged that BellSouth's discovery requests be stayed until after the Commission rules on TCI's Motion for Reconsideration and determines whether to dismiss BellSouth's Complaint.

BellSouth Motion for Procedural Order

On August 1, 2000, BellSouth filed a Motion for Entry of Procedural Order. BellSouth stated that, as the schedule currently stands, there is insufficient time for BellSouth to conduct discovery prior to the date on which its prefiled direct testimony is due. TCI's responses are due on August 11, 2000, which is only one week before BellSouth's prefiled testimony is due. Therefore, BellSouth requested an expedited discovery schedule and a revision of the hearing and prefiled testimony schedule as follows: Prefiled direct testimony on October 20, 2000; prefiled rebuttal testimony on November 3, 2000; and the hearing on or after November 3, 2000.

BellSouth Response to Motion for Reconsideration and Stay

On August 8, 2000, BellSouth filed its Response to Motion for Reconsideration and Request for Stay of Discovery. BellSouth set out three lines of argument.

First, BellSouth argued that the Commission had held correctly that it is not obligated to conduct an audit prior to seeking Commission relief. Section E2.3.14B sets forth the availability of the PIU audit--which the Commission found to be (and TCI admitted was) permissive. Nothing in the tariff bars BellSouth from seeking relief from the Commission to enforce the tariff without conducting an audit. The inclusion of a permissive audit provision does not obligate BellSouth to conduct an audit before, for instance, negotiations can take place. TCI, of course, argued that other provisions in the tariff come into play, but these additional tariff provisions to which TCI cited are inapposite. Section E2.3.14D(4) provides the means by which the new PIU should be applied--if an audit is conducted. Thus, in situations in which BellSouth chooses not to conduct an audit, this section does not apply; nor does it act in any way to modify the permissive nature of Section E2.3.14B(1). TCI also cited to Section E.2.4.1G. This section is even more tangential, inasmuch as BellSouth has attempted to work cooperatively with TCI to resolve this dispute prior to seeking Commission intervention. However, TCI has consistently refused to provide information substantiating its PIU. BellSouth's complaint is not premature since BellSouth has, among other points, investigated it to the extent that it is able and has developed proof independently.

Second, BellSouth argued that the Commission should not dismiss its Complaint on the grounds that the relief sought is allegedly moot. Indeed, the Commission should not even consider this argument because it is a brand new argument and is untimely. Even so, TCI's arguments are without merit. Section E2.3.14.D(1), upon which TCI relies, only applies to an adjustment to the PIU based upon the audit results. If there is not audit, then this section does not apply. BellSouth is seeking enforcement of its tariff and is entitled to back payments.

Third, BellSouth argued that the Commission should deny TCI's Motion to Stay Discovery. BellSouth noted the uncooperative tone of TCI's filing where it characterized all of the interrogatories and requests for production as overbroad. Since there are no grounds for the Commission to reconsider its June 23, 2000, Order, there are similarly no grounds to stay discovery.

TCI's Opposition to Motion for Procedural Order

On August 9, 2000, TCI filed its Opposition to BellSouth's Motion for a Procedural Order. First, TCI noted that the Commission had a Motion for Reconsideration pending *before the Commission*. In the event the Commission does not grant TCI's Motion, TCI continues to oppose BellSouth's request to postpone the established deadlines. Lastly,

should the Commission conclude that BellSouth's Motion should be granted, TCI requested that the Commission provide for non-simultaneous filing of direct and rebuttal testimony.

Whereupon, the Presiding Commissioner reaches the following

CONCLUSIONS

After careful consideration the Presiding Commissioner concludes that TCI's Motion for Reconsideration should be denied for the reasons as generally set forth by BellSouth. The Presiding Commissioner also finds good cause to grant BellSouth's Motion for Procedural Order, subject, however, to the provisions set out below.

1. That the hearing now scheduled for September 19, 2000, be rescheduled to begin on Monday, December 4, 2000, at 1:30 pm, in Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh North Carolina

2 That the parties prefile according to the following schedule

- a. BellSouth shall prefile its direct testimony on October 20, 2000.
- b. TCI shall prefile its direct testimony on November 3, 2000.
- c BellSouth Shall prefile its rebuttal testimony on November 10, 2000

3. That discovery be regulated as follows.

- a. With respect to the discovery which BellSouth filed on July 12, 2000, and BellSouth requested to be due on August 11, 2000, TCI shall have until August 18, 2000, to serve responses and/or file objections on an item-by-item basis. BellSouth has five calendar days to respond to objections.
- b. No additional discovery, including depositions, may be conducted after September 30, 2000.
- c With respect to further data requests, the following procedures shall be followed:
 - (1) Parties shall file data requests with the Commission. The filing party shall fax copies of these data requests to the receiving party at the same time the data requests are filed with the Commission.

- (2) After a data request is filed with the Commission and served on a party via fax, the party receiving the data request shall have seven calendar days to file objections to it on an item-by-item basis. The party objecting to discovery shall fax copies of the objections to the party seeking discovery contemporaneously with such filing.
- (3) If the party seeking discovery intends to pursue requests objected to, it must file responses to the objections on an item-by-item basis within five calendar days after the time the responding party files its objections. The party seeking discovery shall fax copies of its responses to the party objecting to the data request contemporaneously with such filing.
- (4) Parties receiving data requests shall serve answers to data requests to which they have not objected on the party seeking the discovery within 14 calendar days of the filing of such data requests.
- (5) If the Commission orders a party to answer data requests to which it has objected, the party shall have seven calendar days from the date of the Commission Order requiring disclosure to serve answers to such data requests.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 11th day of August, 2000

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen

Geneva S Thigpen, Chief Clerk

12081300 10